SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI,

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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The petitioner, Joseph Accardi, by his attorney, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit which affirmed, by a divided court, the refusal of the District Court for the Southern District of New York to issue a writ of habeas corpus.

Opinions Below

The Court of Appeals affirmed the judgment of the District Court by a divided vote. The majority and dissenting opinions are not yet reported and are set forth beginning at page 17 of the record. The District Court rendered no opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on August 11, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Where an alien is entitled to a deportation hearing conforming to procedural due process, and the administrative record, submitted to the Court, does not reveal *on its face* that matters outside that record were considered or that the case was prejudged, is he precluded from alleging and proving that his hearing was infected with the unfair utilization of confidential information and with prejudgment of his case?

2. Does a petition for a writ of habeas corpus state a cause of action where it alleges unfairness in a deportation hearing by reason of the use of confidential information, prejudgment of the case, and treatment of petitioner, different from all aliens similarly situated?

3. Upon an application for a writ of habeas corpus, may the Court go beyond the application and resolve disputed questions of fact in favor of the government, without affording the petitioner a hearing upon such disputed issues?

Statutes Involved

28 U.S.C. 2243 provides in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the

writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

* * * * *

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained."

Section 19(c) of the Immigration Act of 1917 (62 Stat. 1206; 8 U.S.C. 155 (c)), as amended provides in pertinent part as follows:

"In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense in lieu of deportation, or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

The Seventh Proviso of Section 3 of the Immigration Act of 1917 as amended (39 Stat. 875-878, 8 U.S.C. 136) provides in part as follows:

"Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and under such conditions as he may prescribe."

8 C.F.R. 150.7 (b) which was in force under the 1917 Immigration Act as amended provided in part as follows:

> "*Eligibility for departure in lieu of deportation or for suspension of deportation.* If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation • • • the presiding inspector shall follow his conclusions of law as to the alien's deportability with a discussion of the *evidence* relating to the aliens eligibility for such relief and his reasons for his proposed order. • • •"

Section 405(a) of Public Law 414 (66 Stat. 280), known as the Immigration and Nationality Act of 1952 provides:

> "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any • • • proceedings • • • done or existing at the time this Act shall take effect; but as to all such • • • proceedings • • • the statutes • • • repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. • • • An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, • • • which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Statement

The petitioner seeks through this second application for a writ of habeas corpus to review the legality of a deportation order entered against him on April 3, 1953.

Petitioner asserts that he is a citizen of Italy, that he last entered the United States in 1932, and that he now has a residence of twenty-one years in the United States. He is married to a lawful resident of the United States, has a two year old American born child, and has been a person of good moral character for the past ten years (R. 2-3 Par. 2-7).

Petitioner has been ordered deported upon the ground that he entered the United States in 1932 without a visa (R. 2 Par. 4). The Immigration File of petitioner which was lodged with the Courts below reveals that the only adverse factors in his record were two arrests in 1933 and 1934 which did not result in convictions and a 1940 suspended sentence for violation of 18 U.S.C. 88. The allegation in the application of petitioner's good moral character for the past ten years (R. 3 Par. 7) was not only unopposed but was corroborated by a favorable finding in the decision of the Board of Immigration Appeals, dated April 3, 1953. Notwithstanding his good moral character, his long residence here and his family ties, the Board without assigning reasons, refused to exercise discretion to permit petitioner to remain in the United States as a permanent resident (R. 3 Par. 5). The instant application for habeas corpus alleges, as found by the court below (R. 20) the following new matters which were not presented in the first petition and which furnished a basis for the issuance of a second writ under 28 U.S.C. 2243, 2244:

(1) That the Attorney General maintains a confidential file relative to petitioner, that the government has included his name on a secret purge list, and that because of confidential information and other matters outside the record including the proscribed listing of his name by the Attorney General in October 8, 1952, petitioner was ordered deported in 1953. (R. 3-4 Par. 11-16).

(2) That the Attorney General decided to deport petitioner in October of 1952 and accordingly the case was prejudged in advance of the Board's decision of April 3, 1953. (R. 4 Par. 19).

(3) That notwithstanding the fact that the case was considered deserving of discretionary relief in 1945, and notwithstanding the fact that discretionary relief had been

granted in all similar cases, it was denied in the instant case (R. 3 Par. 9-10).

In the District Court the respondent urged that the present writ herein should not issue because of the prior dismissal of the first application herein. Respondent also denied that matters outside the record were considered, that the case was prejudged, or that relief from deportation had been granted in all similarly situated cases (R. 5-7). The government did admit, however, in open court that the petitioner was on the so-called proscribed list of the Attorney General (R. 15). The District Court denied the application, not as a matter of discretion, but upon the ground that the allegations of the petition for habeas corpus, did not state a basis for the issuance of a writ (R. 15). Accordingly, the merits of the application rather than than the lower courts' exercise of discretion were presented for review to the Appellate Court. *Salinger* v. *Loisel*, 265 U.S. 224,232.

The Circuit Court affirmed in a divided opinion (R. 17). The majority decision, following *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. C. Dist. of Col. 1951) and *U. S. ex rel Weddeke* v. *Watkins*, 166 F. 2d 369 (C.A. 2, 1948), acknowledges that the Immigration Regulations (8 C.F.R. 150.7 (b)) required a due process hearing upon the exercise of discretion to suspend deportation and grant petitioner permanent residence. It further assumes that matters outside the record may not be considered but decides that judicial intervention is only warranted (1) where administrative officials acknowledge utilization of off-the-record material and prejudgment of a case upon the record or file submitted to the court and (2) where allegations of such facts are not made upon information and belief. The majority opinion concludes that the allegation that all similarly situated cases

have been granted permanent residence, is not a provable fact.

The dissenting opinion of Judge Frank takes sharp issue with these conclusions. He states (R. 27):

> "There is no doctrine that a court may never go outside such an official record to discover whether an official himself unlawfully acted on matters outside the record. * * * Ours would be a sorry legal system if it completely shielded from attack a judge's or other official's order simply because the facts revealing its illegality are not in the official record on which the order purports to rest. To confer such immunity would be to make legality a matter of sheer ritualism, of mere outward looks. That way lies tyranny."

Judge Frank asserted that petitioner was entitled to a hearing to establish the truth of the contentions in his application. The dissent considered the allegations made upon information and belief sufficient in conformity with the general practice to plead in this manner where a litigant lacks personal knowledge.

Reasons for Granting Certiorari

This writ of certiorari is sought because the issues presented herein raise important questions of federal pleading and practice, as well as important questions of administrative law. In addition the decision below is in conflict with decisions of this Court and contrary to decisions of other circuits.

1. The majority decision requires that administrative officials furnish evidence of their own improper conduct in their own decisions or in the particular file they choose to lodge with the court. Upon their refusal so to do, as in the instant case where it is claimed that a due process deportation hearing was denied by utilization of confidential in-

formation, the majority below would deny judicial intervention. The dissenting opinion properly denies that this startlingly novel doctrine has any acceptance in the democratic processes of administrative law or federal practice. It finds that this tyrannical concept is contrary to the spirit and principle of *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575,580. This is an issue which requires Supreme Court review not only because of conflict with the *Root* decision and *Kwock Jan Fat* v. *White*, 253 U.S. 455 but also because of the importance of the principle enunciated by the Court below.

2. The Court below considered insufficient assertions in the habeas corpus application alleged upon information and belief. The dissent properly observed that this traditional manner of alleging facts not within the pleader's personal knowledge had been approved by the Supreme Court and in other circuits. *Berger* v. *United States*, 255 U. S. 22, 34-35; *Kelly* v. *United States*, 250 Fed. 947, 948-9 (C.A. 9); *Creekmore* v. *United States*, 237 Fed. 743 (C.A. 8); See also: *Shaw* v. *Protane Corp.*, 1 F. Supp. 980 (W.D. Pa., 1932); *Midwest Mfg. Co.* v. *Staynew Filter Corp.*, 12 F. Supp. 876, 880 (W.D. N.Y., 1935). This issue presents an important question of federal pleading and practice.

This Court has commented appropriately that a "petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice." *Holiday* v. *Johnston*, 313 U. S. 342, 350.

The majority, below, in refusing to accept allegations upon information and belief, paid little heed to this observation. It elevated form over substance and in so doing, it disregarded decisions of this Court and other circuits.

3. The decision below accepted as an established fact, and in the absence of a hearing, the government's denial of

prejudgment and utilization of confidential information. It also decided without any proof or hearing, that petitioner's allegation that his case was treated differently from all similar cases, was not a provable fact. This amazing principle suspends the great writ of habeas corpus. It resolves all disputed questions of fact in favor of the government, without a hearing and without permitting parties to submit proof of their contentions. The importance of this doctrine in habeas corpus practice and procedure in manifest.

In *Price* v. *Johnston*, 334 U. S. 266, 291 this Court observed: "Appellate Courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed." To the same effect as to requirements of a hearing on disputed facts are: *Walker* v. *Johnston*, 312 U. S. 275, 285, 287; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Waley* v. *Johnston*, 316 U. S. 101; *Cochrane* v. *Kansas*, 316 U. S. 255; *Stewart* v. *Overholzer*, 186 F. 2d 339, 342 (C.A. D.C., 1950). The doctrine applies even though the Appellate Court might, as did the majority below, consider the allegations improbable or incapable of proof. *Holiday* v. *Johnston, supra, Waley* v. *Johnston, supra.*

The Court below, contrary to these decisions of this Court and other circuits, resolved disputed questions of fact without a hearing. Because of this conflict, it is submitted that certiorari is appropriate.

4. The decision below is in direct conflict with the mandate of 28 U.S.C. 2243 which requires that an application for a writ should be signed or entertained "Unless it appears from the *application* that the applicant or person detained is not entitled thereto." In the Second Circuit, the practice has developed for the government to submit opposing affidavits, as it did here, to writ applications. The decisions below were not made upon the *application* alone,

as required, but by accepting the disputed facts alleged in the opposing affidavit. Accordingly no writ was issued and no hearing was held. This practice in the Second Circuit, violative of 28 U.S.C. 2243, drastically curtails the important writ of habeas corpus. It presents an unauthorized procedure which should be condemned by the Supreme Court.

Conclusion

The decision below is in conflict with decisions of this Court and with the views prevailing in other circuits. Whether courts may never go outside an official record to discover whether such official himself acted unlawfully on matters outside the record involves an important question of federal procedure and practice. Whether allegations upon information and belief are sufficient, whether disputed questions of fact may be resolved in habeas corpus proceedings without a hearing and whether courts may go outside the application in deciding whether to issue a writ are issues equally deserving of review. The decision below rendered by a divided court, enunciates novel principles of law which have not heretofore been approved by this Court nor by other circuits. For these reasons and for the reasons set forth in the dissent below, petitioner respectfully requests that a writ of certiorari be granted.

Respectfully submitted,

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